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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

STEPHEN B. JONES, LINDA D. LYDIA and CAROLINE FRANCO, as Texas registered voters,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NUMBER 3:00-CV2543-D
GOVERNOR GEORGE W. BUSH AND RICHARD B. CHENEY, as candidates for President and Vice-President of the United States of America; and ERNEST ANGELO, GAYLE WEST, BETTY R. HINES, JAMES B. RANDALL, HELEN QUIRAM, HENRY W. TEICH, JR., WILLIAM EARL JUETT, HALLY B. CLEMENTS, HOWARD PEBLEY, JR., ADAIR MARGO, TOM F. WARD, JR., CARMEN P. CASTILLO, CHUCK JONES, MICHAEL PADDIE, JAMES DAVIDSON WALKER, JOSEPH I. O'NEIL, III, BETSY LAKE, ROBERT J. PEDEN, JIM HAMLIN, MARY E. COWART, SUE DANIEL, JAMES R. BATSELL, LOYCE MCCARTER, MICHAEL DUGAS, NEAL J. KATZ, MARY CEVERHA, CLYDE MOODY SIEBMAN, RANDALL TYE THOMAS, CRUZ G. HERNANDEZ, JOHN ABNEY CULBERSON, STAN STANART, AND KEN CLARK, Texas Electors,	§	
Defendants.	§	

RESPONSE OF DEFENDANTS GOVERNOR GEORGE W. BUSH AND RICHARD B. CHENEY TO THE COURT'S ORDER OF NOVEMBER 22, 2000

Governor George W. Bush ("Governor Bush") and Richard B. Cheney ("Secretary Cheney") respond as follows to this Court's Order dated November 22, 2000:

I.

INTRODUCTION

In its Order dated November 22, 2000, the Court orders the defendants to respond to Plaintiffs' request for (1) expedited discovery, including a deposition of Secretary Cheney on or before December 1, 2000, and (2) an expedited preliminary injunction hearing no later than December 12, 2000, combined with the trial on the merits of this case pursuant to Rule 65(a)(2), Fed. R. Civ. P. As discussed in more detail below, Governor Bush and Secretary Cheney respond that:

1. They have filed a Motion to Dismiss that, they believe, will dispose of this entire action on the face of the pleadings. No discovery should be allowed pending the resolution of their Motion;

2. If discovery is allowed (which it should not be), then it should be limited to written discovery only. It should not include the oral deposition of Secretary Cheney because any evidence the Plaintiffs arguably require is available through less intrusive means; and

3. If this Court proceeds with a preliminary injunction hearing (which it should not for the reasons stated in the Motion to Dismiss), then the hearing should not be combined with a trial on the merits. Instead, any preliminary injunction application should be decided based on the papers and written evidence as set forth in the Court's first November 22, 2000 order.

II.

DISCUSSION

A. Accelerated discovery should not be allowed.

Governor Bush and Secretary Cheney have filed a joint Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) on the grounds that: (i) Plaintiffs lack standing to assert the claims that are the subject of this suit; (ii) the Court lacks subject matter jurisdiction under the political question doctrine; and (iii) Plaintiffs have failed to state a claim for which relief can be granted. These are pure issues of law for which no discovery is required, and Governor Bush

and Secretary Cheney believe that the Court's resolution of these issues will dispose of the entire case. Accordingly, Governor Bush and Secretary Cheney urge the Court not to allow any discovery pending a resolution of their Motion to Dismiss. *See, e.g., Petrus v. Bowen*, 833 F.2d 583 (5th Cir. 1987) ("A trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined.").

B. Secretary Cheney should not be required to give an oral deposition.

If the Court allows discovery, then it should only allow limited written discovery specifically tailored to facts that are directly relevant to this case, and it should not allow an oral deposition of Secretary Cheney. As courts have repeatedly recognized, there is an extraordinary potential for abuse in depositions of high-ranking public officials and prominent private citizens. *See, e.g., In re F.D.I.C.*, 58 F.3d 1055, 1060 (5th Cir. 1995) (discussing high ranking public officials); *Baine v. General Motors Corp.*, 141 F.R.D. 332, 334 (M.D. Ala. 1991) (discussing corporate executives).

Although the Plaintiffs have alleged that Secretary Cheney is an "inhabitant" of Texas, not Wyoming, they have not identified any discovery they need from any of the defendants with respect to this claim, nor have they stated why they legitimately need to depose Secretary Cheney with respect to this claim. On the contrary, almost all the evidence relevant to the determination whether Secretary Cheney is an inhabitant of Texas or Wyoming is objectively verifiable, public information. For example, it is publicly available information that Secretary Cheney:

1. Grew up in Wyoming and was elected to Congress from Wyoming for six terms;
2. Has had a house in Wyoming for more than 20 years;

3. Moved to Dallas in 1995 to accept a position as CEO of Halliburton, but resigned from that position several months ago;

4. Has publicly announced that he and his wife are making their house in Jackson Hole, Wyoming their new permanent home;

5. Has put his house in Dallas up for sale;

6. Has re-registered to vote in Wyoming and voted in Wyoming during the most recent elections;

7. Has obtained a Wyoming drivers license; and

8. Has canceled his Texas voters registration and drivers license.

There is simply no legitimate need to impose upon Secretary Cheney for an oral deposition to verify these and similar facts. Further, there can be no legitimate issue about Secretary Cheney's intent in changing his inhabitance. At a minimum, to the extent the Court believes that there is any legitimate testimony that Plaintiffs need from Secretary Cheney, it is discoverable by less intrusive means, *e.g.* interrogatories.

C. <u>The preliminary injunction hearing, if any, should be based on the papers and it should not be consolidated with a trial on the merits.</u>

If this Court were to proceed to hear the request for preliminary injunctive relief, which the defendants believe the Court should not do, then such request can be heard on the basis of affidavits and other papers as stated by this Court in its first November 22, 2000 order. Plaintiffs can make no showing of need for oral testimony. There is absolutely no basis for Plaintiffs to claim that there is an issue of credibility in this matter and Plaintiffs have not suggested there is. Further, the facts are uncontested and uncontestable.

With respect to the issue of consolidation, Governor Bush and Secretary Cheney agree that, generally speaking, consolidation of a hearing on the request for preliminary injunction with the trial on the merits is often appropriate. However, in this matter, Plaintiffs have created an

urgency for themselves that should not unduly burden the defendants. The defendants in this matter, if it is to proceed, are entitled to a reasonable amount of time to prepare for a final trial on the merits. Plaintiffs have delayed many months in bringing this action and seeking relief. Conducting a trial on the merits in the short amount of time available is unreasonable to the defendants. In fact, at the present time, the vast number of the defendants most recently named have not been served, and hailing them before the Court will be time consuming. These circumstances are all of Plaintiffs own making. Plaintiffs, at most, should be entitled to pursue their request for a preliminary injunction in accordance with the procedure specified in the Court's first November 22, 2000 order. A trial on the merits should be set in due course after determination of the request for preliminary injunction, if this matter is to proceed at all.

WHEREFORE, PREMISES CONSIDERED, Governor Bush and Secretary Cheney respectfully request that the Plaintiffs' Complaint be dismissed, that all costs of court be taxed against the Plaintiffs, and that Governor Bush and Secretary Cheney receive such other and further relief to which they are justly entitled.

Dated: November 27, 2000.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing pleading was served upon the Plaintiffs' counsel and all other counsel of record via telecopier on this the 27th day of November, 2000.

Harriet E. Miers